

Claimant did not file a brief before the Board. Therefore, the Board does not have the benefit of claimant's arguments and contentions concerning the issues raised by the respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the arguments contained in the respondent's brief, the Board makes the following findings and conclusions:

Claimant alleges he injured his low back while performing heavy repetitive work activities for respondent from October 2000, through May 29, 2001.¹ Respondent remanufactures railway cars. Claimant's job was to install I-beams and steel deck plates for the floor of the railway cars. The installation procedure required claimant to bend, squat, kneel and lift the heavy I-beams and steel deck plates. The claimant started working for respondent on May 25, 2000. The first time the claimant had a problem with his low back while working for the respondent was sometime in the middle part of October 2000. At that time, because claimant is a veteran, he received treatment for his low back problem with the Veterans Administration hospital located in Topeka, Kansas. After that treatment, claimant continued to work and his low back problems worsened.

On December 19, 2000, because claimant's low back continued to worsen he sought treatment from a local chiropractor. Claimant received weekly chiropractic treatments through May 29, 2001.

On May 29, 2001, claimant's low back problems worsened to a point that he could no longer perform the repetitive heavy work activities for respondent. At that time, he again went to the VA hospital for treatment. On May 30, 2001, claimant was seen by Dr. Brian Moore and was admitted to the hospital. Claimant had complaints of severe lower back pain and lower extremity weakness. Claimant underwent an MRI examination that showed a broad based herniated disc at L4-5. Claimant remained in the hospital until June 12, 2001. At the October 10, 2001, preliminary hearing, respondent had not returned claimant to work and claimant remained unemployed.

The Board finds the ALJ's conclusion that claimant proved he suffered a low back injury as a result of the heavy repetitive work activities he performed while working for respondent should be affirmed. That conclusion is supported by claimant's testimony and the medical records admitted into the preliminary hearing record.

An injured worker is required to give the respondent notice of accident within 10 days of the date of accident. But failure to give the required 10 day notice shall not bar recovery if the injured worker shows that failure to provide notice within 10 days was due to just cause. The showing of just cause will allow notice to respondent to be extended to

¹ Claimant testified that his last day worked was May 28, 2001. But the employer's statement contained in the group disability insurance application admitted into evidence at the preliminary hearing indicates that claimant's last day worked was May 29, 2001 instead of May 28, 2001.

75 days from date of accident unless actual knowledge of the accident by the employer or the employer's duly authorized agent renders giving notice unnecessary.²

Tyler Ferguson, respondent's safety, environmental and personnel coordinator testified in regard to the notice issue. One of his duties is to administer respondent's workers compensation policies. He testified that employees have the responsibility to inform either their lead man or supervisor of work-related injuries. The lead man is an assistant to the supervisor and if he is notified of an injury then he has the responsibility to inform the supervisor. Mr. Ferguson testified that he had no knowledge claimant was claiming a work-related back injury until June 21, 2001. But Mr. Ferguson also testified that he had contacted claimant's supervisors, after he found out claimant was claiming a work-related injury, and the supervisors knew claimant was working with a sore back.

Claimant testified he knew the procedures that had to be followed to notify respondent of a work-related accident. But claimant had suffered a previous low back injury while working for another employer some ten years before this incident. He had been hospitalized for that low back injury. Because claimant was suffering from low back problems in the same area as his old injury, claimant had some uncertainty of whether he could file a new workers compensation claim. Claimant discussed his low back problems with two of his supervisors and his lead man. Claimant testified, "I didn't come right out and say I injured my back at work, but I think through the actions that I was involved in that it was self-explanatory."³ Because of his low back symptoms, claimant could no longer bend over, so he had to kneel when he placed the I-beams in the railway car floor. Other employees then assisted claimant in placing the steel deck plates.

The ALJ found the notice statute was satisfied because respondent had actual knowledge that claimant's low back problems were aggravated by his work activities. The Board agrees and finds that conclusion is supported both by claimant's testimony and respondent's representative Tyler Ferguson's testimony.

As provided by the Worker's Compensation Act, preliminary hearing findings are not final but subject to modification upon full hearing on the claim.⁴

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Bryce D. Benedict's October 11, 2001, preliminary hearing Order, should be, and is hereby, affirmed.

² See K.S.A. 44-520.

³ Preliminary Hearing Transcript, October 10, 2001, p. 14.

⁴ See K.S.A. 44-534a(a)(2).

IT IS SO ORDERED.

Dated this ____ day of December 2001.

BOARD MEMBER

c: Jeff Cooper, Attorney for Claimant
Eric Lanham, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Workers Compensation Director